

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**JAMISON R. BANNA and
JENNIFER L. BANNA,**

Debtors.

Case No. **02-60880-7**

JAMISON R. BANNA,

Plaintiff.

-VS-

**INTERNAL REVENUE SERVICE,
DONALD DILWORTH, and KELLY
ROBBENNOLT,**

Defendants.

Adv No. **03-00029**

MEMORANDUM OF DECISION

At Butte in said District this 14th day of February, 2005.

In this adversary proceeding to determine tax liability for trust fund taxes under 11 U.S.C. § 505, defendant Internal Revenue Service (“IRS”) filed a motion to abstain on December 21, 2004, with supporting memorandum requesting discretionary abstention under 28 U.S.C. § 1334(c)(1). The plaintiff/Debtor filed a response in opposition setting the matter for hearing, which was held after notice at Missoula on February 10, 2005. The IRS was represented at the hearing by attorney Philip E. Blondin (“Blondin”) of the Tax Division of the U.S. Department of Justice. The plaintiff/Debtor Jamison R. Banna (“Jamison”) appeared and testified, represented

by attorney Daniel S. Morgan (“Morgan”). Plaintiff’s Exhibits (“Ex.”) 1 and 2 were admitted into evidence as answers of codefendants Donald Dilworth (“Dilworth”) and Kelly Robbennolt (“Robbennolt”), but not for the truth of the matters stated therein. At the conclusion of the parties’ cases-in-chief the Court heard argument of counsel, then took the matter under advisement. After review of the record and applicable law, under binding Ninth Circuit authority set forth in *Security Farms v. International Brotherhood of Teamsters* (“*Security Farms*”), 124 F.3d 999, 1009-1010 (9th Cir. 1997), and *In re Lazar* (“*Lazar*”), 237 F.3d 967, 981-82 (9th Cir. 2001), *cert. denied* 534 U.S. 992, 122 S.Ct. 458, 151 L.Ed.2d 377 (2001), the IRS’s motion to abstain is denied because there is no parallel proceeding in state court. This memorandum contains this Court’s findings of fact and conclusions of law.

The parties’ pleadings agree that this Court has jurisdiction pursuant to § 505, but the IRS denies that this is a core proceeding. Jamison commenced this adversary proceeding on March 18, 2003, seeking to determine his liability for trust fund taxes owed by Elocal Network, Inc. (“Elocal”), and ExploreTV.Com, Inc. (“ExploreTV”). Jamison testified that he agreed to go through the IRS’s administrative appeal process, thinking that it would speed resolution, but that a 15 month delay ensued despite the IRS’s representation it would be over in 6 months. Trial of this adversary proceeding is set for March 10, 2005, and Jamison seeks to proceed with that trial to reach finality and realize the benefits of his fresh start.

The IRS moves to abstain on the grounds it has initiated an action in the United States District Court for the District of Montana, Cause No. CV-04-243-M-LBE against Dilworth and Robbennolt, in which it proposes to file an amended complaint to add Jamison and try the matter in federal court, a process which Jamison testified could take another 9 months. Jamison

testified that he is ready for trial next month, and the delay is harming his fresh start and ability to provide for his spouse and children.

The IRS contends that Jamison is enjoying the benefit of a fresh start, but that does not include a choice of forum. The IRS cites authority from other circuits that abstention is appropriate in no-asset cases, and that abstention would promote judicial economy and permit the issues to be litigated in one forum in district court. At hearing Morgan requested the Court consider factors listed in decisions from outside this circuit to determine whether discretionary abstention is appropriate.

DISCUSSION

Discretionary abstention is governed by 28 U.S.C. § 1334(c)(1), which provides: “Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.” *In re General Carriers Corp.*, 258 B.R. 181, 189-190 (9th Cir. BAP 2001). “[A]bstention provisions implicate the question whether the bankruptcy court should exercise jurisdiction, not whether the court has jurisdiction in the first instance.... The act of abstaining presumes that proper jurisdiction otherwise exists.” *In re General Carriers Corp.*, 258 B.R. at 190 (quoting *In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 708 (2nd Cir.1995)); *In re Lewis*, 20 Mont. B.R. 364, 368 (Bankr. D. Mont. 2003).

In *Lewis* this Court cited *Security Farms* and *Lazar* for the following proposition:

In *Security Farms v. International Brotherhood of Teamsters*, 124 F.3d 999 (9th Cir.1997), however, the Ninth Circuit noted that “[a]bstention can exist only where there is a parallel proceeding in state court.” *Id.* at 1009. Section §1334(c)

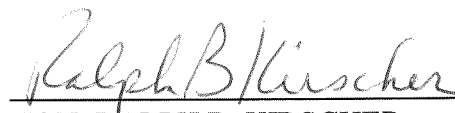
abstention should be read *in pari materia* with 28 U.S.C. § 1452(b) remand, so that § 1334(c) applies only in those cases in which there is a related proceeding that either permits abstention in the interest of comity, section 1334(c)(1), or that, by legislative mandate, requires it, section 1334(c)(2). *Id.* at 1010; *In re Lazar*, 237 F.3d 967, 981 (9th Cir. 2001). A decision to abstain or not to abstain is not reviewable by appeal. § 1334(d); *see also*, *Security Farms*, 124 F.3d at 1009-10 & n. 7; *In re Lazar*, 237 F.3d at 982.

Lewis, 20 Mont. B.R. at 369.

The above Ninth Circuit authority is clear, unambiguous, and binding precedent. As such, the Court declines to apply the analysis for abstention from other circuits as urged by the IRS and Jamison. The record shows that the IRS has initiated a lawsuit in federal court, not in state court. No parallel proceeding exists in state court, as plainly required for abstention in this Circuit under *Security Farms* and *Lazar*. The Court concludes that the requisite for discretionary abstention is not present and the IRS's motion to abstain must be denied.

IT IS ORDERED a separate Order shall be entered in conformity with the above, denying the IRS's motion for discretionary abstention, filed December 21, 2004.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana